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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-543

BRIDGEPORT GUARDIANS, INC., et al.,

Petitioners,

vs.

MEMBERS OF THE BRIDGEPORT CIVIL SERVICE COMMISSION, et al.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners Bridgeport Guardians, Inc., et al. submit this reply memorandum in support of their Petition for Writ of Certiorari.

Respondents suggest that the Second Circuit has accepted and applied the private attorney general rule, citing *Kirkland* v. *New York State Department of Correctional Services*, 374 F. Supp. 1361 (S.D.N.Y. 1974). *Kirkland*, however, is not a decision of the Second Circuit Court of Appeals, but of a district court in the Southern District of New York. The district court decision in *Kirkland* was handed down on April 1, 1974, prior to the Second Circuit decision in the instant case, and the award of counsel fees in *Kirkland* has since been appealed on the ground that *Bridgeport Guardians* precludes any such award.[1] Subsequent to the Second Circuit decision in the

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[1] *Kirkland* v. *New York State Department of Correctional Services*, No. 74-2116, Brief for Defendants-Appellants, pp. 154-156.

instant case, other defendants in that Circuit have uniformly argued that that decision precludes an award of counsel fees under the private attorney general rule. New York City has maintained in several actions that

> [i]n *Bridgeport Guardians* . . . the Second Circuit Court of Appeals reaffirmed the principles set forth in its earlier decision in *Stolberg* [v. *Trustees for the State Colleges of Connecticut*, 474 F.2d 485 (2d Cir. 1973)]. It is clear that the Second Circuit has explicitly rejected the "private attorney general theory" and the other "theories" relied on so heavily by plaintiffs in support of their demand for attorney fees.... The District Court opinion in *Kirkland* v. *Department of Correctional Services*, 7 EPD ¶ 9268 (S.D.N.Y. 1974) relied on so heavily by plaintiffs, has been implicitly overruled by the Court of Appeals in *Bridgeport*.[2]

It is the very essence of the private attorney general rule that counsel fees not be limited to cases where the defendant was guilty of unreasonable, obdurate obstinacy. See e.g. *Brandenburger* v. *Thompson*, 494 F.2d 888 (9th Cir. 1974); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). In the instant case the District Court expressly stated its belief that the standard for awarding counsel fees was whether the defendants had been obdurately obstinate, and denied fees solely on the grounds that they had not. Petition, pp. 11a-12a. The litigation below turned on a narrow question of law. The defendants argued that counsel fees could not be awarded un-

[2] Memorandum In Opposition To Plaintiffs' Motion for Counsel Fees and Costs, pp. 3-5, *Chance* v. *Board of Examiners*, 70 Civ. 4141 (S.D.N.Y.); see also Defendants' Memorandum of Law In Opposition to Plaintiffs' Request for Attorneys' Fees in *ASPIRA* v. *Board of Education of The City of New York*, 72 Civ. 4002 (S.D.N.Y.).

less there was obdurate obstinacy, and the plaintiffs expressly disavowed any claim that there had been such obstinacy. The plaintiffs argued that the lower courts should adopt the private attorney general rule which would mandate an award of counsel fees where, as here, both courts had held that the litigation had vindicated important public policies. Both the District Court and the Court of Appeals denied counsel fees on the ground that there was no obdurate obstinacy. Under the circumstances respondents' suggestion that both courts secretly adopted the private attorney general rule is incomprehensible.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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